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6 | Attorneys for Defendant Alpine Fire Protection District

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 JIM MAXWELL and KAY  
MAXWELL, individually and as  
guardians of TREVER ALLEN BRUCE  
and KELTEN TANNER BRUCE; and  
12 JIM MAXWELL, as executor of the  
ESTATE OF KRISTEN MARIE  
13 MAXWELL-BRUCE,  
14 Plaintiffs,  
15 vs.  
16 COUNTY OF SAN DIEGO; ALPINE  
17 FIRE PROTECTION DISTRICT;  
VIEJAS FIRE DEPARTMENT;  
DEPUTY LOWELL BRYAN "SAM"  
18 BRUCE; DOES 1-50,  
19 Defendants.  
20 }  
Case No. 07 CV 2385 JAH WMc  
[Assigned to Judge Hon. John A.  
Houston]  
  
**MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF MOTION  
TO DISMISS BY DEFENDANT ALPINE  
FIRE PROTECTION DISTRICT**  
  
Date: February 19, 2008  
Time: 2:30 pm  
Ctrm: 11  
  
Complaint Filed: December 19, 2007

23 Defendant Alpine Fire Protection District (“Alpine”) moves to dismiss and/or  
24 sever and dismiss the claims against it in this action, for lack of federal question  
25 jurisdiction or supplemental jurisdiction, under *F.R.C.P.* 12(b)(1) and/or 12(b)(6).

1        **1. Introduction and Summary of Arguments.**

2        The operative complaint alleges two primary claims, arising from two events  
 3 that are separate, both factually and legally:

- 4            • The wrongful shooting of the decedent by her husband, Sheriff's  
 5            Deputy Lowell Bruce, and excessive force and/or deprivation of rights  
 6            by the Sheriffs from the County of San Diego (the "County" or  
 7            "Sheriffs") who responded to that crime, and  
 8            • The alleged gross negligence of the emergency medical personnel  
 9            (EMTs or paramedics) that responded to care for the shooting victim,  
 10           from the Alpine Fire Protection District ("Alpine") and the Viejas Fire  
 11           Department ("Viejas").

12        Only state-based causes of action are alleged against Alpine. There is no  
 13 claim or basis for diversity jurisdiction. There is no federal question jurisdiction  
 14 over Alpine directly. The only basis for federal jurisdiction over Alpine is  
 15 supplemental jurisdiction, premised upon the allegations that co-defendant Sheriffs'  
 16 actions violated the rights of certain plaintiffs, under 14 U.S.C. § 1983. However,  
 17 supplemental jurisdiction is improper here, since the claims against Alpine are  
 18 utterly separate from the claims against the Sheriffs, both factually and legally.

19        This action is comprised of two unrelated claims, wrapped up into one merely  
 20 because the medical negligence claims raised against Alpine happened in sequence  
 21 after the shooting of the decedent, and the battery of, or excessive force against, the  
 22 plaintiffs. There is not enough connection between the two events, factually or  
 23 legally, to justify an extension of supplemental jurisdiction.

24        In fact, it would be beneficial to sever the trials of these two unrelated claims  
 25 (if this motion is denied, Alpine will request severance at an appropriate time).

26        Further, as explained in a separate section below, even the federal claims  
 27 against the Sheriffs are dubious, and deserving of dismissal. If there is no federal  
 28

1 question jurisdiction against the Sheriffs, there is no basis whatsoever for  
 2 supplemental jurisdiction against Alpine.

3

4 **2. The Operative Allegations.**

5 **A. Co-Defendant Lowell Bruce Shoots His Wife, and the**  
 6 **Response by the County of San Diego Sheriff's Department.**

7 This action is filed in response to the unfortunate shooting of the decedent,  
 8 Kristin Marie Maxwell-Bruce, by her husband, former San Diego County Sheriff's  
 9 Deputy Lowell Bruce, in their home during off-duty hours on December 14, 2006.  
 10 [CP ¶ 1.] Deputy Bruce allegedly fired the shot from his service revolver. [CP ¶ 1.]  
 11 There is no allegation that the Bruces' home was located on land owned or  
 12 controlled by the Indian tribe that operates the co-defendant emergency responders,  
 13 the Viejas Fire Dept.

14 The claims sound in wrongful death, and related state-law torts on behalf of  
 15 the decedent's estate, and her survivors. Other state law tort claims are pursued  
 16 related to that shooting on behalf of her parents, Jim and Kay Maxwell, as a result of  
 17 actions by law enforcement personnel at the scene of the shooting.

18 The only causes of action expressly invoking federal question jurisdiction –  
 19 the first, second and sixth, each for violation of 14 U.S.C. § 1983 – are aimed solely  
 20 at co-defendant County of San Diego. Those causes of action, like all of the  
 21 common law allegations, arise from the shooting. [CP ¶ 1.]

22 After the shooting, the decedent, Kristen Maxwell-Bruce, allegedly called  
 23 "911." [CP ¶ 3.] Responding to the "911" call, the San Diego County Sheriffs  
 24 responded, and allegedly "locked down the scene" at the house and "refused to let  
 25 Kristen be taken to the hospital." [CP ¶¶ 3, 36.] They then allegedly mistreated or  
 26 used excessive force against the decedents' parents, plaintiffs Jim and Kay Maxwell,  
 27 and kept them from "seeing, speaking to or comforting Kristen during the last hour  
 28 of her life." [CP ¶¶ 3-4.] Kristen "died at the scene." [CP ¶ 36.]

1       The plaintiffs further allege that the Sheriff's Dept. wrongly hired Deputy  
 2 Bruce, since he was supposedly mentally unfit for the job, and had "twice failed the  
 3 County's Psychological evaluation in order to fill a vacancy" in a County jail  
 4 facility, as well as failed other police departments' psychological tests. [CP ¶¶ 2,  
 5 17-30.] This is alleged in an apparent attempt to claim that but for hiring Deputy  
 6 Bruce, he would not have owned any gun, or shot his wife (with his service  
 7 revolver, or with some other gun).

8       Curious by its absence is any attempt to connect the dots, and allege that the  
 9 claimed error in the County's hiring Deputy Bruce as a Sheriff's Deputy was the  
 10 proximate cause of the shooting, or that but for his being hired as a Sheriff's  
 11 Deputy, the decedent would not have been harmed.

12

13       **B. The Emergency Crews' Care of the Shooting Victim is**  
 14       **Faulted.**

15       Excepting temporally, there is no effort to factually connect the allegations  
 16 arising from the shooting, as against Deputy Bruce or the Sheriff's Department, and  
 17 the separate allegations that the emergency care provided to the decedent by the  
 18 emergency medical technicians/ paramedics that responded (from Alpine and/or  
 19 Viejas) was inadequate. It is alleged that the paramedics were grossly negligent in  
 20 "allow[ing] Kristin [the decedent] to suffocate and drown in her own blood."  
 21 [CP ¶¶ 3, 38.]

22       It is not alleged that any of the responding emergency medical technicians  
 23 (EMTs) or paramedics participated in the abuse or excessive force alleged against  
 24 the Sheriffs. There is no allegation that the "gross negligence" in emergency  
 25 medical care provided was performed in concert with any misdeed alleged against  
 26 the Sheriffs.

27       As against Alpine (and Viejas), the complaint alleges only causes of action  
 28 based upon state law: "wrongful death" [CP ¶¶ 52-54]; "survival" [CP ¶¶ 55-57];

1 “gross negligence” [CP ¶¶ 58-64]; “intentional infliction of emotional distress”  
 2 [CP ¶¶ 76-81]; and “negligent infliction of emotional distress” [CP ¶¶ 82-85].  
 3

4       3.    Supplemental Jurisdiction Does Not Exist for the Purely State-  
 5       Court Claims Against Alpine, Since They Do Not Arise Out of a  
 6       Common Nucleus of Operative Facts With the Federal Claims  
 7       Raised Against Co-Defendants.

8       The only basis for federal jurisdiction alleged against Alpine is supplemental  
 9 jurisdiction, based upon the federal claims under 14 U.S.C. § 1983 alleged against  
 10 the County of San Diego. [CP ¶ 14.] Diversity jurisdiction is not alleged (and from  
 11 the face of the complaint cannot be alleged).

12       Even assuming that the 14 U.S.C. § 1983 allegations against the County of  
 13 San Diego properly create federal question jurisdiction against the County or  
 14 Deputy Bruce – as described below, those claims are legally dubious – the Section  
 15 1983 claims are still not a proper basis for supplemental jurisdiction against Alpine,  
 16 under 28 U.S.C. § 1337(a). That is because the nucleus of facts comprising the  
 17 excessive force/assault claims against the County are utterly unrelated to, and  
 18 independent of, the nucleus of facts comprising the claims of grossly negligent  
 19 emergency care rendered by the paramedics/EMTs from Alpine (and Viejas).

20       That more or different facts might be developed during discovery does not  
 21 preclude dismissal of the claims against Alpine. Whether different state and federal  
 22 claims arise from a common nucleus of facts, sufficient to justify supplemental  
 23 jurisdiction under 28 U.S.C. § 1337(a), is “ordinarily resolved on the pleadings.”  
 24 *New Rock Asset Partners, L.P. v. Preferred Entity Advancements* (3d Cir. 1996) 101  
 25 F.3d 1492, 1505.

26       The test for whether supplemental jurisdiction can be used to extend federal  
 27 question jurisdiction to include state-based claims is whether they “form part of the  
 28 same case or controversy under Article III of the United States Constitution.” 28

1 U.S.C. § 1367(a). “Same case or controversy,” in turn, is defined as being where  
 2 multiple claims arise from “a common nucleus of operative facts,” such that a  
 3 plaintiff “would ordinarily be expected to try them all in a single judicial  
 4 proceeding.” *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725 (“*Gibbs*”);  
 5 accord, *Kirschner v. Klemons* (2<sup>nd</sup> Cir. 2000) 225 F.3d 227, 239.

6 The determination of whether multiple claims arise from “a common nucleus  
 7 of operative facts” is largely discretionary. *City of Chicago v. Int'l College of*  
 8 *Surgeons* (1997) 522 U.S. 156, 172. Courts have discretion to decline supplemental  
 9 jurisdiction where, in addition to weighing whether diverse state and federal claims  
 10 arise from “a common nucleus of operative facts,” the court finds that doing so  
 11 would be detrimental to the case, based upon “a host of factors … including the  
 12 circumstances of the particular case, the nature of the state law claims, the character  
 13 of the governing state law, and the relationship between the state and federal claims  
 14 ....” *Id.* at 173; see also, *Gibbs*, 383 U.S. at 357 (supplemental jurisdiction can be  
 15 declined, even where some “common nucleus” of facts exists, based on “judicial  
 16 economy, convenience, fairness to the parties and comity.”)

17 There is some discussion, in cases such as *Executive Software No. America,*  
 18 *Inc. v. United States Dist. Ct.* (9<sup>th</sup> Cir. 1994) 24 F.3d 1545, 1552-1555, that an  
 19 amendment of 28 U.S.C. § 1367 abrogated *Gibbs*, insofar as *Gibbs* provided District  
 20 Courts with broader grounds to deny supplemental jurisdiction once a court found  
 21 that state and federal claims arose from the same “nucleus of facts.” However, in  
 22 *City of Chicago*, a case post-dating *Executive Software* and the amendment to 28  
 23 U.S.C. § 1367, the Supreme Court continued to apply and quote *Gibbs* with  
 24 approval. “[W]e have indicated that ‘district courts [should] deal with cases  
 25 involving pendent claims in the manner that best serves the principles of economy,  
 26 convenience, fairness, and comity which underlie the pendent jurisdiction  
 27 doctrine.’ ” *City of Chicago*, 522 U.S. at 172-173, quoting *Gibbs*, 383 U.S. at 357.  
 28 See also, Schwartzer, etc., CALIFORNIA PRACTICE GUIDE – FEDERAL CIVIL

1 PROCEDURE BEFORE TRIAL, ¶¶ 2.152 – 2.152.3, pp. 2B-68 – 2B-69 (The Rutter  
 2 Group 2007).

3       Here, there is no “common nucleus of facts” between the claims of medical  
 4 negligence against Alpine and the claims sounding in excessive force and battery as  
 5 against the Sheriff or Deputy Bruce. The standard of care for EMTs delivering  
 6 emergency services is utterly unrelated to the legal prohibitions against use of  
 7 excessive force, battery, or shooting one’s spouse. The only relationship between  
 8 the two claims is that one followed the other in time. No meaningful factual  
 9 conclusions or legal findings will be shared between the two actions.

10       Indeed, if this motion is denied, Alpine will, at the appropriate time, request  
 11 that the trial of the claims against it for medical negligence be severed from the trial  
 12 against the County and Deputy Bruce. Being tried alongside the decedent’s shooter  
 13 would be too prejudicial, and would create too great a risk of confusion of the  
 14 otherwise unrelated claims against the co-defendants, to justify being tried together.

15       It differences between the claims against Alpine and the County should be  
 16 obvious. The claims of medical negligence against Alpine may, at most, have  
 17 followed in sequence the shooting and Sheriff’s actions. The key facts do not  
 18 overlap, however, for any purpose beyond providing background. That is not  
 19 enough. This court would be well within its discretion in refusing to extend  
 20 supplemental jurisdiction over Alpine. Comparisons are nonetheless useful.<sup>1</sup>

21       For example, in *Roberts v. Lakeview Community Hosp.* (D.Ala. 1997) 985  
 22 F.Supp. 1351, 1351-1352, a doctor assaulted the plaintiff, a nurse, and later their  
 23 hospital allegedly demoted and replaced her with a less qualified male employee as  
 24 a result of her reaction to that assault. The lawsuit that followed combined state-  
 25 based causes of action for assault and battery, as well as federal claims of gender

26  
 27       

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<sup>1</sup> Other useful examples here supplemental jurisdiction was denied are contained in  
 28 Schwartz, etc., CALIFORNIA PRACTICE GUIDE – FEDERAL CIVIL PROCEDURE BEFORE  
 TRIAL, ¶¶ 2.150.1 - 2.150.5, pp. 2B-65 – 2B-66 (The Rutter Group 2007).

1 discrimination, in violation of Title VII. 85 F.Supp. at 1352. The District Court  
 2 found supplemental jurisdiction lacking over the plaintiff's state law assault and  
 3 battery claim against the doctor because the assault and battery claim did not arise  
 4 from the same facts as plaintiff's gender-based Title VII claim against the hospital,  
 5 based upon her subsequent demotion. *Id.* The fact that the demotion factually  
 6 followed the assault, and was the result of it, was not enough.

7 In deciding that there was an insufficient nexus between the alleged assault  
 8 and battery and the demotion, the District Court pointed out that whether plaintiff  
 9 committed an assault and battery made no difference in the jury's ultimate decision  
 10 regarding whether the demotion was gender-based. *Roberts*, 85 F.Supp. at 1352.  
 11 Compare that, in this case, the shooting of the decedent by Deputy Bruce, and the  
 12 Sheriff's treatment of the plaintiffs at the crime scene, are factually unrelated to the  
 13 facts pertaining to the quality of the paramedics' care of the decedent before she  
 14 died. Different conduct, and different facts, must be weighed to decide the two  
 15 claims. The jury's decision on one set of facts here will, like in *Roberts*, have no  
 16 bearing on their decision on the other set of facts.

17 Or, in *Soliday v. Miami County, Ohio* (6<sup>th</sup> Cir. 1995) 55 F.3d 1158, 1161-  
 18 1162, the plaintiffs, relatives of a prisoner, brought a suit against the County  
 19 sounding in wrongful death and violation of Section 1983 civil rights, based upon  
 20 the County providing inadequate medical care to the decedent, who had AIDS. The  
 21 plaintiffs also alleged state-based causes of action against the County Coroner, for  
 22 violating their instruction to cremate the decedent's remains. 55 F.3d at 1162. The  
 23 District Court was held to have properly refused to extend supplemental jurisdiction  
 24 over the state-based claims against the County Coroner, since allegations related to  
 25 cremation of the remains did not arise out of the same "common nucleus of  
 26 operative facts as the federal civil rights claims. This was so, even though the  
 27 cremation claims necessarily arose out of, and immediately followed in time, the  
 28

1 same facts relating to the prisoner's death, which was caused by the alleged  
 2 violation of his civil rights. *Id.* at 1164-1165.

3 In *Soliday*, the Court of Appeals described that the state law claim for was  
 4 "separate and distinct" from the federal civil rights claim, even though the two  
 5 claims clearly arose close together in time, and from a common initial event: the  
 6 death of the prisoner. 55 F.3d at 1165. The distinction there is the same as exists  
 7 here – different people allegedly violated different legal duties, such that each claim  
 8 would require independent findings to adjudicate.

9 From the foregoing examples, it is clear that having disparate events occur  
 10 closely in terms of time or location is not the same thing as having them arise out of  
 11 a "common nucleus of facts." Supplemental jurisdiction is inappropriate where  
 12 unrelated state-based causes of action arise out of facts or events that are  
 13 independent of federal claims. Such is the case here. Supplemental jurisdiction is  
 14 inappropriately extended over the purely state-based causes of action pleaded  
 15 against Alpine. Since no other basis for federal question jurisdiction exists as  
 16 against Alpine, the case against it should be dismissed.

17

18 **4. There is No Causal Connection Pleaded, or Logically Existing,**  
 19 **Between the Shooting and the Section 1983 Violations Alleged**  
 20 **Against Deputy Bruce and the County of San Diego.**

21 Alpine does not stand in the shoes of the County of San Diego. Alpine does  
 22 not know, again at this early time, how the County will respond to the Complaint.  
 23 But Alpine must point out that the effort to bootstrap the (ostensibly) state law  
 24 claims against the County and Deputy Bruce into violations of federal statute, 14  
 25 U.S.C. § 1983, is dubious. Analysis of the claims against the County or Deputy  
 26 Bruce is appropriate here because supplemental jurisdiction cannot exist without  
 27 original jurisdiction. See, *Herman Family Revocable Trust v. Teddy Bear* (9<sup>th</sup> Cir.  
 28 2001) 254 F.3d 802, 805.

1       Even where federal jurisdiction might exist, it is proper to consider the  
 2 comparative weakness of the federal claim in deciding whether supplemental  
 3 jurisdiction is appropriate. See, *Diven v. Amalgamated Transit Union* (D.C.Cir.  
 4 1994) 38 F.3d 598, 602.

5       The Complaint relies upon several untenable leaps of logic to support its only  
 6 federal claims, under Section 1983. Most glaring of these is the illogical leap that  
 7 the hiring of Deputy Bruce by the County of San Diego was somehow the proximate  
 8 cause of the shooting. Or, but for the hiring of Deputy Bruce, and subsequently  
 9 providing him with a service revolver, he would not have obtained a different  
 10 weapon, or otherwise would not have harmed his wife that fateful night. It strains  
 11 logic beyond the breaking point to claim that anything related to the hiring of  
 12 Deputy Bruce proximately caused him to shoot his wife at home, during off-duty  
 13 hours, and unrelated to anything arising from his duties as a Sheriff's Deputy.

14       A second leap of logic required by the Complaint is that the psychological  
 15 tests alleged, given by police entities to job applicants, are designed to reveal any  
 16 tendency to gun violence, at all or toward one's spouse. Admittedly, the nature of  
 17 the tests, and what they are intended to reveal in an applicant, are facts not shown in  
 18 the Complaint. But the Complaint too easily assumes, without explicitly alleging,  
 19 that the tests somehow should have foretold this act of violence against a spouse.  
 20 This is one more seemingly unreasonable assumption that makes it even more  
 21 difficult to logically connect the Section 1983 allegations to the unrelated state law  
 22 claims against Alpine, so as to justify extending supplemental jurisdiction over  
 23 Alpine.

24       The existence of these illogical leaps is fatal to the complaint since, to be  
 25 actionable, the alleged violation of rights under Section 1983 must have proximately  
 26 caused the harm alleged. It is not enough to allege a violation of rights, but then  
 27 claim harm that bears no logical cause-in-fact relationship to that violation. "In a  
 28 section 1983 action, the plaintiff must demonstrate that the defendant's conduct was

1 the actionable cause of the claimed injury. ... To meet this causation requirement,  
 2 the plaintiff must establish both causation-in-fact and proximate causation.” *Tahoe-  
 3 Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (9th Cir. 2000)  
 4 216 F.3d 764, 783, citing, among others, *Arnold v. IBM Corp.* (9th Cir. 1981) 637  
 5 F.2d 1350, 1355. The standard test for proximate causation applies: whether the  
 6 harm alleged is a reasonably foreseeable result of the violation of rights claimed  
 7 under Section 1983. *Tahoe-Sierra*, 216 F.3d at 783, fn. 34.

8       The failure to explicitly plead a cause-in-fact relationship between Deputy  
 9 Bruce’s hiring and the shooting is fatal to the complaint because it is not rational to  
 10 believe (or allege) that, by hiring Deputy Bruce, even with supposed problems in his  
 11 passing psychological surveys, it was reasonably foreseeable he would harm his  
 12 wife. (Indeed, any contrary conclusion would probably obligate the Sheriffs to  
 13 involuntarily institutionalize anyone who failed their psychological survey, to  
 14 protect themselves and others.) The fact that such claims of proximate causation  
 15 would be inherently illogical would make moot any request for leave to amend the  
 16 Complaint to cure that omission.

17       The existence of the second cause of action, claiming “*Monell* liability,” does  
 18 not cure this flaw. In *Monell v. Dept. of Social Services*, (1978) 436 U.S. 658, 690-  
 19 694, the Supreme Court held that where a governmental entity or agency is subject  
 20 to liability under 14 U.S.C. § 1983, such liability cannot result merely from an  
 21 improper, or even unconstitutional, act of its employees under a theory of  
 22 respondeat superior. Instead, under *Monell*, liability can be imposed against the  
 23 County of San Diego here for the acts of Deputy Bruce only if it is shown that his  
 24 actions were taken pursuant to the governmental entity’s “official policy.” *Id.*

25       This “official policy” prerequisite distinguishes “acts of the municipality from  
 26 acts of employees of the municipality,” and establishes that governmental entity  
 27 liability is limited to actions for which the entity bears some logical blame. See,  
 28 *Pembaur v. City of Cincinnati*, (1986) 475 U.S. 469, 479-480. An act of a

1 governmental employee, unrelated to his duties, does not give rise to liability unless  
 2 it was taken pursuant to, or was the actual result of, an official policy of the entity,  
 3 or of an official or other employee who held final authority to establish the entity's  
 4 policy with respect to the conduct at issue. A governmental entity is not held liable  
 5 solely because it hired a person who committed a tort. *Monell*, 436 U.S. at 691.

6 As described above, the Complaint contains allegations that the County  
 7 violated a rule or policy by hiring Deputy Bruce despite his failing one or more  
 8 psychological surveys. However, there is still no logical claim that, by hiring  
 9 Deputy Bruce, the County should have reasonably foreseen he would harm his wife,  
 10 at home and unrelated to his official duties as an officer. Deputy Bruce shooting his  
 11 wife was not, of itself, a violation of some official policy of the Sheriff's  
 12 Department or the County (that doing so was clearly illegal does not bootstrap the  
 13 shooting, off duty and at home, into a violation of "official policy").

14

15 **5. The Existence of Viejas Fire Dept., an Entity Alleged to be**  
 16 **Affiliated With an Indian Tribe, Does Not Preclude Dismissal of**  
 17 **the Claims Against Alpine.**

18 The Complaint alleges that co-defendant Viejas Fire Dept. is "wholly-owned  
 19 and operated by the Viejas Band of Kumeyaay Indians," a local tribe. [CP ¶ 9.] The  
 20 Complaint contains no allegation that federal jurisdiction is implicated by the fact  
 21 that an Indian tribe is a party. Instead, as against both Viejas and Alpine, only  
 22 supplemental federal jurisdiction is alleged, under 28 U.S.C. §§ 1343 and 1367(a),  
 23 based upon the causes of action brought under 14 U.S.C. § 1983 alleged against co-  
 24 defendant County of San Diego or Deputy Bruce only. [CP ¶ 14.]

25 At this early stage, Alpine does not know whether Viejas will object to  
 26 federal jurisdiction, or move to dismiss for lack of federal question jurisdiction (or  
 27 on any other ground, such as sovereign immunity). Further, Alpine must accept the  
 28 allegation that the Viejas Fire Dept. is legally a part of that Indian tribe ("Viejas

1 Band of Kumeyaay Indians" [CP ¶ 9]), and is not an independent legal entity.  
 2 However, to preserve its right to object to lack of federal question jurisdiction as  
 3 against it, Alpine must point out that the existence of a tribe-affiliated party does not  
 4 prevent dismissal of the case for lack of any federal question raised against Alpine  
 5 (or Viejas).

6 "Federal question jurisdiction does not exist merely because an Indian tribe is  
 7 a party." See, *Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of*  
 8 *Digueno Mission Indians of the Viejas Group Reservation* (D.Cal. 2000) 83  
 9 F.Supp.2d 1155, 1157, fn. 1, citing *Gila River Indian Community v. Henningson,*  
 10 *Durham & Richardson* (9th Cir. 1980) 626 F.2d 708, 715, *cert. denied*, 451 U.S.  
 11 911 (1981); and *Martinez v. Southern Ute Tribe* (9th Cir. 1957) 249 F.2d 915, 917,  
 12 *cert. denied*, 356 U.S. 960 (1958). A case does not "arise under" federal law, thus  
 13 implicating federal question jurisdiction under 28 U.S.C. § 1362, if it contains only  
 14 state-based causes of action. Further, that parallel claims under federal common law  
 15 might have been brought does not create federal question jurisdiction. See, *Gila*  
 16 *River*, 626 F.2d at 714-715. Indian tribes can be sued in state or federal court  
 17 (mostly) equally, depending on the nature of the claim being asserted.

18 True, 28 U.S.C. § 1362 extends federal jurisdiction over all claims brought  
 19 "by" Indian tribes. But this action is *against* an entity that is allegedly a part of, or  
 20 affiliated with, an Indian tribe. Section 1362 is thus inapplicable. See, *Enterprise*  
 21 *Elec. Co. v. Blackfeet Tribe of Indians* (D.C.Mont. 1973) 353 F.Supp. 991, 992.

22 Even assuming that 28 U.S.C. § 1362 applies, an exception stated within that  
 23 statute precludes creation of federal jurisdiction under it. The exception is that  
 24 federal jurisdiction will exist for claims by Indian tribes **only** where "the matter in  
 25 controversy arises under the Constitution, laws, or treaties of the United States."  
 26 *Ibid.* In other words, for jurisdiction to exist for claims "by" Indian tribes under 28  
 27 U.S.C. §1362, federal question jurisdiction must exist. "[U]nder § 1362, *the matter*  
 28 *in controversy*, and we emphasize that phrase, must itself arise under the

1 Constitution, laws, or treaties of the United States.” (Emphasis in opinion.)  
 2 *Mescalero Apache Tribe v. Martinez* (10th Cir. 1975) 519 F.2d 479, 483. Here, the  
 3 allegations against Viejas are identical to those against Alpine, and none invoke  
 4 federal question jurisdiction – they are purely state claims. None of the allegations  
 5 here “arise[] under the Constitution, laws, or treaties of the Untied States.” 28  
 6 U.S.C. § 1362.

7

8

## 6. Conclusion.

9 The shooting of Kristen Maxwell-Bruce is undeniably a serious and sad  
 10 incident, and harmful in uncountable ways to her family. It is equally undeniable,  
 11 however, that tort liability for that incident, under the allegations contained in the  
 12 operative Complaint, does not involve a federal question as against defendant  
 13 Alpine Fire Protection District. It even does not appear to raise a viable federal  
 14 question as against the co-defendant County of San Diego – and if there is no  
 15 federal jurisdiction over the County, supplemental jurisdiction over Alpine is  
 16 impossible.

17 Supplemental jurisdiction over Alpine is unavailable since the allegations of  
 18 medical negligence against the Alpine Fire Protection District are undeniably  
 19 separate and unrelated to the claims of excessive force and battery claimed as  
 20 against the County and Deputy Bruce. There is no connection between the facts  
 21 needed to prove the claims against the Sheriff, and the different claims against  
 22 Alpine. Indeed, the jury will not be required to make any factual findings in the suit  
 23 against the Sheriff that will be useful to determine liability against Alpine.

24 Nothing will be gained by including the medical negligence claims against  
 25 Alpine and Viejas simultaneously with the lawsuit against the Sheriff and Deputy  
 26 Bruce. Much would be lost by doing so anyway, in the form of increasing the cost  
 27 and length of the trial, and needlessly multiplying and complicating the unrelated  
 28 issues that must be decided by the jury.

Alpine Fire Protection District respectfully requests that the claims against it be dismissed, for failure to raise any federal question jurisdiction or supplemental jurisdiction, under *F.R.C.P.* 12(b)(1) and/or 12(b)(6).

4 || Dated: January 10, 2008

# HAIGHT BROWN & BONESTEEL LLP

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Alpine Fire Protection District

**PROOF OF SERVICE BY MAIL**

*JIM MAXWELL and KAY MAXWELL vs. COUNTY OF SAN DIEGO; ALPINE FIRE PROTECTION DISTRICT; VIEJAS FIRE DEPARTMENT; DEPUTY LOWELL BRYAN "SAM" BRUCE; DOES 1-50*  
USDC No.: 07 CV 2385 JAH WMc

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 6080 Center Drive, Suite 800, Los Angeles, CA 90045-1574.

On January 10, 2008, I served on interested parties in said action the within **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT ALPINE FIRE PROTECTION DISTRICT** by placing a true copy thereof in sealed envelope(s) addressed as stated below as stated below and causing such envelope(s) to be deposited in the U.S. Mail at Los Angeles, California.

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I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

Executed on January 10, 2008, at Los Angeles, California.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Theresa L. Welsch  
(Type or print name)

/s/ Theresa Welsch  
(Original Signed)

## **PROOF OF SERVICE BY FACSIMILE**

*JIM MAXWELL and KAY MAXWELL vs. COUNTY OF SAN DIEGO; ALPINE FIRE PROTECTION DISTRICT; VIEJAS FIRE DEPARTMENT; DEPUTY LOWELL BRYAN "SAM" BRUCE; DOES 1-50  
07 CV 2385 JAH WMc*

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On January 10, 2008, I served on interested parties in said action the within:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO  
DISMISS BY DEFENDANT ALPINE FIRE PROTECTION DISTRICT**

12 I caused the foregoing document to be served by facsimile transmission to  
13 each interested party at the facsimile machine telephone number shown as  
follows:.

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Executed on January 10, 2008, at Los Angeles, California.

1 I declare under penalty of perjury that I am employed in the office of a  
2 member of the bar of this Court at whose direction the service was made and that the  
3 foregoing is true and correct.

4 Stephen M. Caine  
5 (Type or print name)

6 /s/ Stephen M. Caine  
7 (Signature)

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